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99TH CONGRESS
2d Session

SENATE

REPORT
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A BILL TO EXTEND THE AUTHORIZATION FOR NOT-FOR-PROFIT ORGANIZATIONS OPERATED IN THE INTEREST OF HANDICAPPED AND BLIND INDIVIDUALS TO RECEIVE PROCUREMENT CONTRACTS UNDER THE SMALL BUSINESS ACT

REPORT

OF THE

COMMITTEE ON SMALL BUSINESS
UNITED STATES SENATE

TO ACCOMPANY

S. 2147

COMPLETED
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JUNE 5 (legislative day, JUNE 2), 1986.—Ordered to be printed

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CONTENTS

	Page
I. Committee Consideration	1
II. Legislative History	3
A. Background	3
B. Need for Legislation	4
III. Significant Provisions of the Committee Amendment	7
A. Annual Ceiling	7
B. Appeal Process	8
C. Subcontracting	10
D. Monitoring	10
E. Task Force	11
F. Other Issues	11
IV. Section-By-Section Analysis	12
V. Matters Required To Be Discussed Under Senate Rules	14
A. Committee Vote	14
B. Cost of Legislation	15
C. Regulatory Impact Statement	16
D. Changes in Existing Law	16

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99TH CONGRESS
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REPORT
99-318

AMENDING THE SMALL BUSINESS ACT TO EXTEND THE AUTHORIZATION FOR NOT-FOR-PROFIT ORGANIZATIONS OPERATED IN THE INTEREST OF HANDICAPPED AND BLIND INDIVIDUALS TO RECEIVE PROCUREMENT CONTRACTS

JUNE 5 (legislative day, JUNE 2), 1986.—Ordered to be printed

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Mr. WEICKER, from the Committee on Small Business, submitted the following

REPORT

[To accompany S. 2147]

The Committee on Small Business, to which was referred the bill S. 2147 to amend section 15(c) of the Small Business Act (15 U.S.C. § 644(c)) to reauthorize the eligibility of not-for-profit sheltered workshops to bid on small business set-aside contracts in an aggregate amount for each year not to exceed $50,000,000, having considered the same, reports favorably with an amendment in the nature of a substitute, and recommends that the bill, as amended, do pass.

I. COMMITTEE CONSIDERATION

S. 2147 was introduced by Senators Weicker and Kerry on March 6, 1986 and referred to the Small Business Committee. It was cosponsored by Senators Cochran, Nickles, Sarbanes, Quayle, Baucus, Inouye, Matsunaga, Pressler, Hollings, Riegle and D'Amato. The bill proposes to reauthorize the eligibility of sheltered workshops operating for the benefit of the severely handicapped and blind to compete for small business set-aside contracts under Section 15 of the Small Business Act (15 U.S.C. § 644.) The bill would restore the eligibility of such workshops which existed in law from 1981-1983.

On March 26, 1986, Senator Weicker chaired a full Committee hearing on S. 2147. Ten witnesses testified: Frank Swain, Chief Counsel for Advocacy, Small Business Administration; Mr. Eivind H. Johansen, President, National Industries for the Severely Handicapped; Dr. William Wolk, Executive Director, South Shore Rehabilitation Center; Barry Trilling, Trilling and Kennedy; Eliott Barrow, Jebco, Inc.; Colin Offenhartz, Fraas Survival Systems, Inc.; William J. McAllister, President, HLI Lordship Industries; James

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Gashel, National Federation of the Blind; Dwight Whittaker, Executive Director, Development Workshop; and Anthony Young, Fairfax Opportunities Unlimited.

While all of the witnesses agreed on the need to assist handicapped and blind individuals in their pursuit of employment, there was concern expressed by some that the reauthorization of eligibility would cause economic difficulties for some for-profit businesses. Representatives from the sheltered workshop community, by contrast, spoke enthusiastically of S. 2147, and applauded its goal of allowing workshops once again to compete for small business set-aside contracts.

On May 21, 1986, the Committee met in executive session and, with a quorum present, ordered S. 2147, with an amendment in the nature of a substitute (the "Committee Amendment") to be favorably reported. This amendment changed S. 2147 in several important ways to address concerns raised during the Committee hearing. Specifically, the following modifications were adopted:

(1) An $8 million limitation was established on the amount of Section 15(c) contracts that can be transferred to the Procurement List under the Javits-Wagner-O'Day Act in any one fiscal year;

(2) A strict timetable for the prosecution of appeals by a for-profit concern was established; and

(3) The 20 percent test for "severe economic injury" was eliminated.

The Committee Amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

That section 15(c) of the Small Business Act (15 U.S.C. 644(c)) is amended to read as follows:

(c)(1) As used in this subsection:

(A) The term "Committee" means the Committee for Purchase from the Blind and Other Severely Handicapped established under section 1 of the Act entitled "An Act to create a Committee on Purchases of Blind-made Products, and for other purposes", approved June 25, 1938 (41 U.S.C. 46).

(B) The term "public or private organization for the handicapped" has the same meaning given such term in section 3(e).

(C) The term "handicapped individual" has the same meaning given such term in section 3(f).

(2)(A) During each of the fiscal years 1987 through 1991, public or private organizations for the handicapped shall be eligible to participate in programs authorized under this section in an aggregate amount for each year of no more than $50,000,000.

(B) In each of the fiscal years 1987 through 1991, no more than $8,000,000 of the $50,000,000 authorized for participation by subparagraph (A) may be placed on the procurement list maintained by the Committee pursuant to section 2 of the Act entitled "An Act to create a Committee on Purchases of Blind-made Products, and for other purposes", approved June 25, 1938 (41 U.S.C. 47).

(3) The Administrator shall monitor and evaluate such participation.

(4) (A) Not later than 10 days after the announcement of a proposed award of a contract by an agency or department to a public or private organization for the handicapped, a for-profit small business concern that has experienced or is likely to experience severe economic injury as the result of the proposed award may file an appeal of the proposed award with the administrator.

(B) If such concern files an appeal of a proposed award under subparagraph (A) and the Administrator, after consultation with the Executive Director of the Committee, finds that the concern has experienced or is likely to experience severe economic injury as the result of the proposed award, not later than 30 days after the filing of the appeal, the Administrator shall require each agency and department

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having procurement powers to take such action as may be appropriate to alleviate economic injury sustained or likely to be sustained by the concern.

(5) Each agency and department having procurement powers shall report to the Office of Federal Procurement Policy each time a contract subject to paragraph (2)(A) is entered into, and shall include in its report the amount of the next higher bid submitted by a for-profit small business concern. The Office of Federal Procurment Policy shall collect data reported under the preceding sentence through the Federal procurement data system and shall report to the Administration which shall notify all such agencies and departments when the maximum amount of awards authorized under paragraph (2)(A) has been made during any fiscal year.

(6) For the purpose of this subsection, a contract may be awarded only if at least 75 percent of the direct labor performed on each item being produced under the contract in the sheltered workshop or performed in providing each type of service under the contract by the sheltered workshop is performed by handicapped individuals.

Sec. 2. Not later than September 30, 1990, the General Accounting Office shall prepare a report describing the impact that contracts awarded under section 15(c) of the Small Business Act have had on for-profit small business concerns for fiscal years 1987 through 1989. The report shall be transmitted to the Senate Committee on Small Business and the Committee on Small Business of the House of Representatives.

Sec. 3. There is established within the Small Business Administration a task force on purchases from the blind and severely handicapped which shall consist of one representative of the small business community appointed by the Administrator of the Small Business Administration and one individual knowledgeable in the affairs of or experienced in the work of sheltered workshops appointed by the Executive Director of the Committee for Purchase from the Blind and Other Severely Handicapped established under section 1 of the Act entitled "An Act to create a Committee on Purchases of Blind-made Products, and for other purposes", approved June 25, 1938 (41 U.S.C. 46). The task force shall meet at least once every six months for the purpose of revieving the award of contracts under section 15(c) of the Small Business Act and recommending to the Small Business Administration such administrative or statutory changes as it deems appropriate.

II. Legislative History

A. BACKGROUND

The Congress initially passed legislation authorizing workshop competition in the small business set-aside program in 1977. Section 502(c) of Public Law 95-89 called for a one-year experiment to allow workshops operating for the benefit of the handicapped and blind to submit bids for government procurement and service contracts under Section 15 of the Small Business Act. (15 U.S.C. § 644.) When authority for workshop participation lapsed on September 30, 1978, the Congress included a two-year extension of the program in the Omnibus Small Business Act of 1978, H.R. 11145. President Carter vetoed the bill on October 25, 1978 for reasons unrelated to the workshop issue. In 1980, the Congress again passed legislation to reauthorize workshop eligibility for a three-year period from October 1, 1980 to September 30, 1983. S. 2698 was signed into law by President Carter on July 2, 1980 as Public Law 96-302. This three-year reauthorization allowed workshops to compete for up to $100 million a year on small business contracts. In fact, however, during the entire three-year life of the program, less than $10 million in awards was actually made to workshops out of a total of $38 billion in contracts to for-profit small businesses under Section 15 of the Small Business Act. This represents a miniscule one-fourth of one percent of total small business contracts.

Section 116 of Public Law 96-302 required the Small Business Administration to monitor and evaluate the participation of the

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sheltered workshops in the program and to report to the Congress the results of its evaluation. In complying with this requirement, on December 18, 1981, the Small Business Administration concluded that there was "no measurable economic injury * * * sustained by for-profit small businesses * * *." Both houses of Congress subsequently passed reauthorization legislation during the 98th Congress: the Senate S. 1323 on October 7, 1983, and the House passed H.R. 3020 on March 15, 1984. For reasons unrelated to the merits of the bill, the measures died in conference.

The Congress has thus consistently expressed its approval of workshop eligibility for the small business set-aside program, and, in fact, has taken legislative action in every Congress since 1977 to assure the continued vitality of the program. This year, the Committee has once again indicated its unanimous approval of legislation to give workshops the opportunity of bidding on certain government contracts.

B. NEED FOR THE LEGISLATION

Sheltered workshops are licensed and regulated by the Department of Labor under authority of the Fair Labor Standards Act. A sheltered workshop is defined as "a charitable organization or institution conducted not for profit but for the purpose of carrying out a recognized program of rehabilitation for handicapped workers * * *" (29 CFR § 525.2(b)). They "provide a controlled, work-oriented environment to assist handicapped persons to develop their optimal level of vocational and social functioning." [1] Sheltered workshops as not-for-profit chartiable organizations benefit from a tax-exempt status.

Under the Small Business Act, only small business concerns may compete on set-aside contracts. Section 3 of the Act defines a small business concern as "one which is independently owned and operated and which is not dominant in its field of operation." Regulations under the authority of the Small Business Act further define "concern" as "any business entity organized for profit . . . which makes a significant contribution to the U.S. economy through payment of taxes." (13 CFR § 121.3(b).) This for-profit requirement prevents workshops and other not-for-profit organizations from submitting bids on government procurement contracts set aside for small business.

It is in order to create a statutory exemption to the SBA regulatory requirements that the Congress has consistently voted in 1977, 1978, 1980, and 1984 to allow workshops to bid on procurement contracts. It is for the same reason that the Committee recommends passage of S. 2147.

The Committee is aware of a related federal program created to assist the handicapped and blind in obtaining employment. The Javits-Wagner-O'Day Act (P.L. 92-28, June 23, 1971 42 U.S.C. §§ 49 et seq.) creates a Committee for the Purchase from the Blind and Other Severely Handicapped ("CPBOSH") whose statutory responsibility is placing certain select items or services on a "Procure-

[1] General Accounting Office, "Stronger Federal Efforts Needed for Providing Employment Opportunites and Enforcing Labor Standards In Sheltered Workshops," HRD-81-99, September 28, 1981.

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ment List, upon request by a sheltered workshop". Once the commodity is placed on the Procurement List, the Federal government is obligated thereafter to make all purchases of that commodity or service from the sheltered workshop.[2] The Javits-Wagner-O'Day program provided $84.3 million in contracts to workshops in FY 1979 and $268 million in FY 1985. It has been growing during this period at a rate of over 20 percent per year with additions to the Procurement List of about $28 million a year.

The Committee heard testimony from some for-profit businesses that the workshops are sufficiently serviced by the Javits-Wagner-O'Day program, and that there is no need to allow workshops to compete under a separate program. However, the Committee received convincing testimony that there is a compelling need for an additional approach to provide employment opportunities for the blind and handicapped. A recent study by Louis Harris and Associates indicates that two-thirds of the handicapped are without employment, even though an overwhelming majority want to work, and over half fall below the poverty line.[3] Whatever the success of the Javits-Wagner-O'Day program, it is clear that the handicapped and blind still face considerable difficulties in finding employment and bettering their circumstances.

Additionally, there are obvious procedural differences between the lengthy application process required for a permanent set-aside under the Javits-Wagner-O'Day Act and the immediacy of spot-bidding for individual contracts under the small business set-aside process. Since the Javits-Wagner-O'Day Act places certain commodities permanently on an exclusive procurement list, it is appropriate that the degree of scrutiny exercised by the reviewing agency be rigorous and probing. Such exaction necessarily involves delays, stemming from the need to assess the impact of the decision on small business generally. A workshop with available labor needs to put is clients to work immediately, and a program which awards contracts of a limited duration on the readily-determined basis of a low bid provides an exemplary opportunity for workshops to fill that void.

Mr. Eivind Johansen, President of the National Industries for the Severely Handicapped, testified at the hearing:

> For a variety of reasons many of the contracts set aside for small businesses are not suitable for the Javits-Wagner-O'Day program. As a result, without the opportunity to bid, opportunities are lost to the workshop.

The Committee believes that a renewed eligibility to compete for set-aside contracts is a helpful complement to the Javits-Wagner-O'Day program and gives workshops enhanced flexibility in seeking alternate sources of employment for their handicapped workers. As Dwight Whittaker, Executive Director of Development Workshop in Idaho and a member of the National Association of Rehabilitation Facilities, testified: "[S. 2147] is a restoration of eli-

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[2] See Report No. 98-546, "Improvements Needed In The Administration of the Javits-Wagner-O'Day Act," House Committee on Government Operations, pgs. 6-9.

[3] Testimony of Murphey Taylor, Hearings "Reauthorization Hearings on Discretionary Programs of the Education of the Handicapped Act," Senate Subcommittee on the Handicapped, Committee on Labor & Human Resources, February 24, 1986.

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gibility that holds the promise of providing disabled individuals with employment opportunities while providing goods and services for the U.S. Government under the Small Business Set-Aside program in a competitive manner."

While it is clear that workshops and their handicapped employees will benefit from passage of S. 2147, it is equally clear that tangible benefits will accrue to the government. In addition to the unquestionable merit of making tax-payers out of tax-users, the government is assured of getting a needed commodity or service at a lower reasonable price, since under the Small Business set-aside program, awards are made to the low bidder.

A further distinction between the Javits-Wagner-O'Day program and the small business set-aside involves the competitive nature of the latter. Under Javits-Wagner-O'Day, only sheltered workshops may be recipients under a permanent set-aside. Under the 15(c) program, workshops must compete against for-profit small businesses, and they will not prevail unless theirs is the low bid. There is no assurance that workshops will in fact win every contract on which they submit a bid; while they do not pay federal or state income taxes, they do have certain additional capital and personnel costs relating to the nature of their workers not necessarily encountered by small businesses.

The Committee is cognizant of concerns that workshops will use S. 2147 as a vehicle for transferring commodities or services to the Procurement List under Javits-Wagner-O'Day. Frank Swain, Chief Counsel for Advocacy at the Small Business Administration argued:

> If * * * a sheltered workshop develops its industrial capacity to produce the item by successfully bidding for a Section 15(c) small business set-aside contract, and later applies to the Committee to have that item added to the procurement list, the likelihood of approval would increase * * * [I]n a worst case scenario, a sheltered workshop could ultimately place an item onto the procurement list by consciously underbidding on a small business set-aside and developing the expertise to produce the good or service at the expense of for-profit businesses.

The Acting Administrator of the Small Business Administration, Charles Heatherly, in a letter dated May 7, 1986, to Chairman Weicker urged preventive measures against such a possibility suggesting that the Committee for Blind and Other Severely Handicapped develop guidelines "to ensure that purchases under section 15(c) [of the Small Business Act] are not converted to exclusive procurement list items in areas which already have a large sheltered workshop presence." It was unclear, however, what would constitute a "large" presence, triggering a prohibition on transfer, and who would decide what limitations to impose.

The Committee remains convinced of the immediate need for the renewal of workshop eligibility under the set-aside program. Providing meaningful employment opportunities to the nation's most disadvantaged remains a top priority. A number of workshops, unable to have items placed on the Procurement List for a variety of reasons, have nevertheless hoped to bid on individual procure-

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ment contracts, but have been unable to do so since September 30, 1983. As Mr. Whittaker noted, "As a result of the lapse of previously enacted authority, rehabilitation facilities have lost and continue to lose the opportunities to train and employ the disabled citizens of this great country."

The Committee believes that the Javits-Wagner-O'Day program and the 15(c) small business set-aside program should operate as discrete yet complementary opportunities for workshops. The 15(c) set-aside should not be used as a precursor to an assignment on the Procurement List, but rather as an alternate opportunity for a workshop to seek work for its clients on the spot market, responding to seasonal needs, with transfers over to the Procurement List only in appropriate instances. Both programs should be used to facilitate employment opportunities for workshops.

III. Significant Provisions of the Committee Amendment

While the Committee believes S. 2147 is necessary to assist the handicapped and blind in their pursuit of employment opportunities, it hopes to minimize any adverse impact on the for-profit small business community. The Committee is aware of claims made by various small business government contractors that renewal of the 15(c) authorization will cause them further losses on top of those experienced under the Javits-Wagner-O'Day program. In an attempt to address those concerns, the Committee Amendment makes substantial improvements over previous enactments. The Committee Amendment represents a finely-tuned and well-balanced bill which accommodates both the legitimate desires of the workshop and the undeniable concerns of the small business community.

A. ANNUAL CEILING

Previous enactments of the 15(c) workshop authorization set an annual ceiling of $100 million in contract awards. In response to concerns expressed at the hearing by the Administration and others, the Committee Amendment sets an annual ceiling of $50 million of new contract awards under the small business set-aside program of which no more than $8 million may be transferred from the 15(c) program over to the Procurement List of Javits-Wagner-O'Day. Cumulation of unused amounts is not permitted. This cap represents 16 percent of the annual total which may be awarded to workshops under the Committee Amendment and represents less than one-half of one percent of the total amount of $38 billion awarded to small businesses under the small business set-aside program during FY 1981–1983. While there is no indication that the cumulative impact on the small business community by workshop participation is other than minimal, the reduction in the annual ceiling to $50 million still provides workshops sufficient room for growth over their prior years' records, while insuring that their presence will not be unduly burdensome to the for-profit community.

Additionally, the Committee Amendment requires Federal procurement officers to notify the Office of Federal Procurement Policy ("OFPP") of any contract awarded to a sheltered workshop.

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This change in prior law responds to an earlier criticism heard by the Committee in reporting out S. 2698 during the 96th Congress. S. Rept. 96-703. It also insures that the various procurement activities will be notified by the Administrator as expeditiously as possible in the event that the annual statutory ceiling for workshop contracts has been reached. In this way, the burden is no longer on the procurement officers themselves to determine when the contract limits are likely to be exceeded. To the extent there is any lag time in reporting, OFPP will have to extrapolate likely dollar amounts to be reached in the course of a fiscal year and report periodically to the various procuring activities the results of such extrapolation. After the initial year's experience, the Committee anticipates that recordkeeping and reporting techniques will improve substantially.

B. APPEAL PROCESS

The Committee Amendment also clarifies the appeal process that a for-profit bidder (as used in this section and throughout the report, the term "bidder" encompasses an offeror on a request for proposal and any other prospective contractor) must take to challenge an award to a sheltered workshop. Under previous legislative versions, the Administrator of the Small Business Administration and the Executive Director of CPBOSH shared a dual adjudicative function. It was inappropriate to confer on the Executive Director such authority in a program which falls under the jurisdictional authority of the Administrator. The Administrator has the greatest familiarity with the Small Business Act, and it is incumbent on him to adjudicate disputes arising thereunder. Consequently, while the Administrator should consult with the Executive Director prior to reaching a decision, it is the Administrator's decision to make.

The ground for appeal remains "severe economic injury." While the term is not quantified in the Committee Amendment, the bill as introduced provided that a loss of 20 percent of annual sales would constitute severe economic injury. That standard was rejected as too restrictive. The Administrator is thus permitted discretion in determining the standards of "severe economic injury", but in reviewing the effects of an award to a workshop on the for-profit bidder which would have won the award but for the bid submitted by the workshop, the Administrator is encouraged to consider a variety of competing factors including but not limited to: (1) the number of handicapped or blind workers who will obtain employment as a result of the award; (2) the prospective loss of employment opportunities to the for-profit concern; (3) the loss in sales to the for-profit concern as a result of the award; (4) the economic environment of the for-profit concern including the local and regional unemployment rates; (5) the economic history of the for-profit concern in competing against other not-for-profit organizations, and (6) the economic injury to the for-profit concern which would occur as a result of a subsequent transfer of the contract to the Procurement List maintained by CPBOSH, under Section 2 of the Javits-Wagner-O'Day Act. The Administrator may consider the cumulative impact of the present award on the for-profit bidder in the context of previous awards. In no instance should the Administrator

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reverse an award when the for-profit concern would not, but for the participation of the sheltered workshop, have received the contract award. In an appropriate case, the Administrator may transmit his findings to the Executive Director of CPBOSH.

One criticism frequently voiced by small business concerns of the proposed reauthorization of workshop eligibility is that in the event that a workshop successfully bids on a contract and subsequently applies for a transfer to the Javits-Wagner-O'Day program, the workshop will be in the position of current or most recent contractor. Under regulations promulgated under the Javits-Wagner-O'Day, the Executive Director, in determining adverse economic impact, is only required to investigate the impact on the current or most recent contractor. In response to this concern, the Committee Amendment imposes an $8 million cap on the amount of transfers from the 15(c) program over to Javits-Wagner-O'Day and has directed the Administrator, in his review powers, to consider the severity of economic impact which might arise as a result of an ultimate transfer to Javits-Wagner-O'Day.

In the hope of abbreviating the appeal process under section 15(c), the Committee has imposed stringent time guidelines which will curb the impetus to file appeals merely for purposes of delay. A for-profit bidder on a 15(c) contract which appears to have lost a contract to a workshop must file an appeal within ten days of notification of an intention by the contracting activity to award a contract. A contracting activity will notify all applicants that they have ten days to appeal the proposed award by filing notice of intent to appeal with the Administrator. The Administrator has thirty days from the date of filing of the appeal to render a decision whether the proposed award would cause severe economic injury to the next highest for-profit bidder and to order appropriate relief. The right of appeal extends only to the for-profit bidder which would be the likely contract awardee but for the offer of the successful workshop. All other for-profit businesses, who competed for the contract, may submit materials in support of the appellant. Filing of legal briefs, inclusion of written evidence, or oral argument are within the discretion of the Administrator. The Administrator may order appropriate relief to an aggrieved bidder, including the modification or vacation of a proposed award. He may also, for example, reduce the size of an award to a workshop, delay its effective date, alter the terms of the contract, or ask the contracting activity to otherwise accommodate the needs of the small business. Prior to making any final decision, however, the Administrator shall confer and coordinate any such order with the contracting agency to minimize any potential detrimental impact on the agency's activities.

The Committee encourages the Administrator promptly to dismiss frivolous appeals filed for the purpose of delay or harassment. Reversals or modifications should be the exception and not the rule.

Further, the Committee for the Purchase from the Blind and Other Severely Handicapped is directed to develop and publish guidelines for assessing the impact of proposed transfers of contracts for commodities or services under Section 15(c) to the Procurement List maintained by CPBOSH. Such guidelines should

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take into account the impact of the proposed transfer on similarly situated small businesses which have historically relied on government contracts for the commodities or services described in the application for transfer.

C. SUBCONTRACTING

The Committee Amendment adds a requirement that at least 75 percent of the actual man-hours of direct labor performed on a 15(c) set-aside contract in the workshop must be performed by the handicapped or blind themselves. It is the Committee's expectation and hope that the handicapped and blind, who are the legitimate beneficiaries of section 15(c), should be given the lion's share of the work and every effort should be made to elevate handicapped and blind workers to positions of responsibility or supervision in performing a 15(c) contract.

While the Committee has heard allegations that S. 2147 would permit a workshop successfully to bid on a small business set-aside contract only to subcontract substantially all of the work to a for-profit concern, no corroborating evidence has been presented to show that such a scenario is likely to occur. Workshops will win a 15(c) set-aside contract only if theirs is the low bid; for them to then subcontract the work out to a higher-wage-base for-profit concern would guarantee that they are performing the contract at a loss. Additionally, workshops exist primarily to provide remunerative employment opportunities for their handicapped and blind workers. For them to renounce their lauded goals by engaging in wholesale subcontracting is to call in question the basic premise upon which they exist.

The Committee staff has nevertheless reviewed the available data to determine whether the workshops have in fact been abusing the Javits-Wagner-O'Day program to engage in unreasonable subcontracting. The National Industries for the Severely Handicapped has presented documentation to the Committee indicating that of 400 commodity and service contracts set aside for the severely handicapped between 1981 and 1985, with a total dollar value of $66 million, only 78 had portions which were subcontracted, totalling $997,000 or 1.5 percent of the dollar total. Subcontracting has generally occurred where the physical limitation of the handicapped or blind workers rendered certain tasks dangerous or impossible.

In monitoring the program, the Administrator of the Small Business Administration should ascertain whether there is excessive or abusive subcontracting to the detriment of the program's goals and in contravention of the Congress' intention and report any such instances to the House and Senate Small Business Committees.

D. MONITORING

As in previous enactments, the bill maintains a requirement that the Administrator monitor and evaluate the participation of sheltered workshops in the small business set-aside program. The Administrator is uniquely qualified to determine the relative success of workshop participation and whether it is causing undue hardship on segments of the small business community. The Adminis-

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trator, in his adjudicative function, will necessarily be faced with a number of complaints from the small business community concerning claims of unfair competition. The Administrator should be attentive to the congressional goals of promoting meaningful employment opportunities for the blind and handicapped under the auspices of a program intended to benefit the nation's small businesses.

The Committee also directs the Chief Counsel for Advocacy of the Small Business Administration to monitor the impact on small business of the participation by workshops in the set-aside program. In particular, the Chief Counsel is encouraged to develop procedures to notify small businesses likely to be impacted by workshop participation of a pending bid on a product or service and to notify them of the procedures by which a workshop may apply for a transfer to the Procurement List. The Chief Counsel may intercede in appropriate instances to notify the Administrator of likely adverse economic impact on small businesses in the case of an appeal of a 15(c) award or the Executive Director of CPBOSH in the case of a transfer to the Javits-Wagner-O'Day Procurement List.

Finally, the Committee Amendment requires the General Accounting Office to submit a report to the House and Senate Small Business Committees on the impact of contracts awarded to workshops under section 15(c) of the Small Business Act on for-profit small businesses. The GAO report is required by September 30, 1990, a full year before the program would expire, so that the report can be duly considered in any reauthorization of the program.

E. TASK FORCE

The Committee is aware of strident differences between the workshop community and the small business government contractor community. In hopes of providing a forum to air those differences and work out disagreements, the Committee is calling for the creation of an advisory task force within the Small Business Administration, composed of one member of the for-profit small business community appointed by the Administrator and one member knowledgeable in the affairs affecting sheltered workshops by the Executive Director of CPBOSH. The Committee hopes that this advisory task force will make joint recommendations to the Senate and House Small Business Committees as need be, for changes in the law, and to the Administrator and Executive Director for changes in interpretation of the law.

F. OTHER ISSUES

The Committee has been urged to include a provision requiring workshops which bid on 15(c) contracts to pay their handicapped workers minimum wages as required of other businesses under the Fair Standards Act of 1938 ("FLSA") and to assure the upward mobility of the blind and handicapped workers. Currently, workshops are licensed and certified by the Department of Labor, and under section 14(c) of the Fair Labor Standards Act (19 U.S.C. § 214(c)), they are permitted to pay their handicapped workers subminimum

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wages which are commensurate with their measured productivity. They are periodically audited by Department of Labor investigators to determine whether in fact wages paid are an accurate reflection of productivity. A 1981 GAO study concluded,

> Our analysis of Department of Labor special certification showed that the congressional intent to generally provide a guaranteed wage of 50 percent of the statutory minimum wage to handicapped persons working in a productive capacity in sheltered workshops has not been realized.[4]

While some in the handicapped community feel that regardless of productivity, all workshop employees should share the minimal benefits of the Nation's labor laws such as the FLSA, others feel that a wage structure which ignores the realities of reduced productivity would make competitive bidding for the workshops all but impossible. Additionally, while the Committee heard testimony mirroring a 1983 recommendation of the House Committee on Government Operations that "upward mobility for sheltered workshop employees and affirmative action placement of blind and handicapped individuals in supervising and management positions should be improved and encouraged * * *," some have suggested that such a recommendation ignores the practical realities of certain disabilities.

The Committee feels that the issue of the proper measure of wage compensation and promotional opportunities for workshop employees should be examined in the context of a comprehensive review of the Javits-Wagner-O'Day Act which is the jurisdictional responsibility of the Committee on Labor and Human Resources. The Committee has received assurances from the Subcommittee on the Handicapped, which would have principal jurisdiction over the primary issues, that such a review will be forthcoming during the next Congress.

IV. Section-by-Section Analysis

Section 1 of S. 2147 as amended would amend Section 15(c) of the Small Business Act through the following subsections:

Subsection 1 identifies three terms employed throughout the bill: The " 'Committee'; 'public or private organization for the handicapped' and 'handicapped individual' ". While earlier enactments of workshops eligibility made reference to section 7(h) in defining certain terms of art, S. 2147 modified the definitional section to make reference to sections 3(e) and 3(f) of the Small Business Act as the more relevant reference points.

Subsection 2(A) allows sheltered workshops to compete for small business set-aside contracts in an amount no greater than $50,000,000 for each of the fiscal years 1987 through 1991. This subsection thus sets an annual ceiling on the amount of contracts that may be awarded to workshops and imposes a five-year sunset provision, requiring reauthorization beginning with fiscal year 1992.

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[4] GAO report (HRD-81-99, p. 10).

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Subsection 2(B) sets an $8,000,000 ceiling on the amount of contracts awarded under the competitive bidding process of subsection 2(A) which may subsequently be transferred over to the Procurement List maintained by the Committee for the Purchase from the Blind and Other Severely Handicapped. Any amounts not transferred over in a given year do not cumulate to succeeding years. The Executive Director, in reviewing an application for assignment to the Procurement List, should initially determine whether the commodity or service which is the basis of the application was orginally awarded to the workshop under the auspices of section 15(c) of the Small Business Act. If more than $8,000,000 of contracts originally awarded under section 15(c) of the Small Business Act in the current or previous years have been transferred to the Procurement List in the current year, then no further consideration of the application for assignment is in order.

Subsection 3 requires the Administrator to monitor and evaluate the participation by workshops in the small business set-aside program. The Administrator should focus on both the impact on small business of competition by the workshops and the impact on workshop objectives and practices of being authorized to compete again on the small business procurement contracts.

Subsection 4(A) established a right of appeal in a small business which has experienced or is likely to experience severe economic injury as the result of a proposed award to a sheltered workshop. The small business which is so affected must file notice of an appeal with the Administrator no later than ten days after notification to it of an intention by a contracting activity to make an award to a workshop.

Subsection 4(B) requires the Administrator to reach and render a decision in the event of an appeal taken by a for-profit concern no later than thrity days after the filing of the appeal. The Administrator, prior to reaching his decision, should consult with the Executive Director of the Committee for the Purchase from the Blind and Other Severely Handicapped, although he need not modify his decision in the case of disagreement. If the Administrator finds merit in the appeal, he may require the contracting activity to take appropriate corrective measures, including the modification or vacation of an intention to make an award. In every event, any relief ordered should be commensurate with the degree of harm sustained or likely to be sustained by the for-profit concern.

Subsection 5 imposes record-keeping requirements on each contracting activity to notify the Office of Federal Procurement Policy every time a contract is entered into with a workshop under the auspices of section 15(c). It is the obligation of each contracting activity to notify OFPP of the data, size, duration, terms and conditions of each contract, and to include details of the next-higher bid submitted by a for-profit concern. Each contracting activity should file such data as expeditiously as possible with the OFPP so that the data are current. The OFPP should collate the data and report periodically to the Administrator the results of its record-keeping. OFPP should notify the Administrator whenever the annual $50,000,000 ceiling in permissible awards is reached or is likely to be reached. OFPP is encouraged to extrapolate its conclusions for a

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given fiscal year in appropriate circumstances based on reliable data.

In the event that the Administrator is notified or has reason to believe that the $50,000,000 annual ceiling has been or is likely to be reached, he shall promptly notify all contracting activities that workshops are ineligible to submit bids on small business set-aside contracts for the balance of the fiscal year.

Subsection 6 imposes a requirement that at least 75 percentum of the direct man-hours of labor preformed within a workshop on a 15(c) contract must be performed by the handicapped or blind themselves.

Section 2 requires GAO to prepare a report for Congress no later than September 30, 1990 describing the impact on competition that participation by the workshops in the 15(c) small business set-aside program has had on small business.

Section 3 calls for the creation of a task force within the Small Business Administration to examine the interests and concerns of small businesses and workshops which arise as a result of participation by the workshops in the small business set-aside program. The task force will consist of two individuals, one appointed by the Administrator representing the small business community and one appointed by the Executive Director knowledgeable in the affairs of sheltered workshops. The task force should meet at least biannually to review the program and to forward to the SBA their mutually-agreed upon suggestions.

V. Matters Required To Be Discussed Under Senate Rules

A. COMMITTEE VOTE

In compliance with Rule XXVI(7)(b) of the Standing Rules of the Senate, the following role call vote was recorded:

On the motion by Senator Kerry to adopt S. 2147, as amended by an amendment in the nature of a substitute, to extend the authorization of not-for-profit organizations operated in the interest of handicapped and blind individuals to receive procurement contracts under the Small Business Act, the vote was:

YEAS—17	NAYS—0
Weicker	
Boschwitz	
Gorton (*)	
Nickles	
Rudman (*)	
D'Amato (*)	
Kasten (*)	
Pressler (*)	
Trible	
Bumpers (*)	
Sasser	
Baucus	
Levin	
Dixon	
Boren (*)	
Harkin	
Kerry	

*Indicates vote by proxy.

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B. COST OF LEGISLATION

In compliance with Rule XXVI(11)(a)(1) of the Standing Rules of the Senate, the Committee estimates that the cost of the legislation will be equal to the amounts indicated by the Congressional Budget Office in the following letter:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 29, 1986.

Hon. LOWELL P. WEICKER, Jr.,
Chairman, Committee on Small Business,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 2147, a bill to extend the authorization for not-for-profit organizations operated in the interest of handicapped and blind individuals to receive procurement contracts under the Small Business Act, as ordered reported by the Senate Committee on Small Business, May 21, 1986. We expect that enactment of this bill would result in a cost to the federal government of about $150,000 to $200,000 in 1990, and in no significant costs in other years.

Under current law, only small business concerns may compete for federal set-aside contracts. This bill would allow sheltered workshops operating for the benefit of the severely handicapped and blind to compete for these contracts through 1991. The bill would establish an annual ceiling of $50 million on contracts awarded under this program.

S. 2147 would require each federal agency to report to the Office of Federal Procurement Policy (OFPP) regarding the amounts awarded under this bill and the next higher bid submitted by a for-profit business. According to the OFPP, these data would be collected through the federal procurement data system administered by the General Services Administration. Because this data system is currently to modify the data base to collect such information, assuming enactment of S. 2147 in the next few months.

The Small Business Administration (SBA) would be required to rule on appeals by small businesses that experience severe economic injury as a result of contract awards made under this program, and to monitor and evaluate the procurement awards. Although it is not certain how many small businesses would make appeals,we do not expect that SBA would incur any significant costs to resolve appeals or to oversee the program.

Finally, the bill would require the General Accounting Office (GAO) to prepare a report describing the impact that contracts awarded under these provisions have had on for-profit small business during the 1987–1989 period. Based on information from GAO, we estimate that this study would cost about $150,000 to $200,000 in 1990.

No costs would be incurred by state or local governments as a result of enactment of this bill.

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If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

RUDOLPH G. PENNER, *Director.*

C. REGULATORY IMPACT STATEMENT

In compliance with Rule XXVI(11)(b) of the Standing rules of the Senate, it is the opinion of the Committee that no significant additional regulatory impact would be incurred in carrying out the provisions of this legislation; there would be no additional impact on the personal privacy of companies or individuals who utilize the services provided; and there would be no additional paperwork impact resulting from the enactment of this bill.

D. CHANGES IN EXISTING LAW

In compliance with rule XXVI(12) of the Standing Rules of the Senate, changes in existing law made by the bill are shown as follows (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic and existing law in which no change is proposed is shown in roman):

SMALL BUSINESS ACT

* * * * * * *

SECTION 15(a). To effectuate the purposes of this Act, small business concerns within the meaning of this Act shall receive any award or contract or any part thereof, and be awarded any contract for the sale of Government property, as to which it is determined by the Administration and the contracting procurement or disposal agency . . .

* * * * * * *

(c)(1) [During fiscal years 1981, 1982, and 1983, public and private not-for-profit organizations eligible for assistance under section 7(h) of this Act shall be eligible to participate in programs authorized under this section in an aggregate amount not to exceed $100,000,000 for each such year:] *As used in this subsection:*

(A) The term 'Committee' means the Committee for Purchase from the Blind and Other Severely Handicapped established under section 1 of the Act entitled 'An Act to create a Committee on Purchases of Blind-made Products, and for other purposes', approved June 25, 1938 (41 U.S.C. 46).

(B) The term 'public or private organization for the handicapped' has the same meaning given such term in section 3(e).

(C) The term 'handicapped individual' has the same meaning given such term in section 3(f).

(2)(A) During each of the fiscal years 1987 through 1991, public or private organizations for the handicapped shall be eligible to participate in programs authorized under this section in an aggregate amount for each year of no more than $50,000,000.

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(B) In each of the fiscal years 1987 through 1991, no more than $8,000,000 of the $50,000,000 authorized for participation by subsection (A) may be placed on the Procurement List maintained by the Committee pursuant to section 2 of the Act entitled 'An Act to create a Committee on Purchases of Blind-made Products, and for other purposes', approved June 25, 1938 (41 U.S.C. 47).

[*Provided,* That the Administrator shall monitor and evaluate such participation and in any case where the Administrator and the Executive Director of the Committee for the Purchase from the Blind and Severely Handicapped find that the participation of such organizations has or may cause severe economic injury to for-profit small businesses, the Administrator shall and is hereby authorized to direct and require every agency and department having procurement powers to take such actions as the Administrator and the Executive Director of the Committee for the Purchase from the Blind and Severely Handicapped may deem appropriate to alleviate the economic injury sustained or likely to be sustained by such for-profit small businesses.

[(2) The Administration shall, not later than January 1, 1982, prepare and transmit to the Senate Committee on Small Business and the House Committee on Small Business, a report on the impact of contracts awarded to such organizations on for-profit small businesses.]

(3) The Administrator shall monitor and evaluate such participation.

(4)(A) Not later than 10 days after the announcement of a proposed award of a contract by an agency or department to a public or private organization for the handicapped, a for-profit small business concern that has experienced or is likely to experience severe economic injury as the result of the proposed award may file an appeal of the proposed award with the Administrator.

(B) If such a concern files an appeal of a proposed award under subparagraph (A) and the Administrator, after consultation with the Executive Director of the Committee, finds that the concern has experienced or is likely to experience severe economic injury as the result of the proposed award, not later than 30 days after the filing of the appeal, the Administrator shall require each agency and department having procurement powers to take such action as may be appropriate to alleviate economic injury sustained or likely to be sustained by the concern.

(5) Each agency and department having procurement powers shall report to the Office of Federal Procurement Policy each time a contract subject to paragraph (2)(A) is entered into, and shall include in its report the amount of the next higher bid submitted by a for-profit small business concern. The Office of Federal Procurement Policy shall collect data reported under the preceding sentence through the Federal procurement data system and shall report to the Administration which shall notify all such agencies and departments when the maximum amount of awards authorized under paragraph (2)(A) has been made during any fiscal year.

(6) For the purpose of this subsection, a contract may be awarded only if at least 75 percent of the direct labor performed on each item being produced under the contract in the sheltered workshop or per-

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formed in providing each type of service under the contract by the sheltered workshop is performed by handicapped individuals.

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